

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION IV

CACR 06-528

January 24, 2007

TRACY HAYES
APPELLANT

AN APPEAL FROM PULASKI COUNTY
CIRCUIT COURT [CR 2004-5126]

V.

HON. JOHN LANGSTON, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Tracy Hayes appeals from her conviction for the second-degree battery of her sixteen-month-old daughter, Shanaya. Hayes argues that the trial court erred 1) in denying her motion for a directed verdict because the State failed to prove that she knowingly or intentionally caused Shanaya's injuries, and 2) in denying her pretrial motion to compel the State to prove an intentional mental state. We affirm on both points.

Hayes was charged with second-degree battery after admitting Shanaya to Arkansas Children's Hospital with injuries to the toddler's left forearm on October 25, 2004. Doctors at the hospital determined that Shanaya's arm was broken in two places.

The State charged Hayes with second-degree battery pursuant to Ark. Code Ann. § 5-13-202(a)(4)(C) (Repl. 2006). The information tracked the language of this statute by

specifying that Hayes “intentionally or knowingly without legal justification caused physical injury” to her daughter. Because the information specified two mental states – knowing and intentional – Hayes filed a pretrial motion to compel the State to apply the intentional mental state. She asserted in her motion that because two mental states were enumerated in the information, she did not have adequate notice of the elements of the crime with which she was charged. Immediately preceding the bench trial in this case, the trial court denied Hayes’s motion to compel.

The trial court heard testimony from the hospital’s social worker, the investigating officers, the treating pediatrician, an expert radiologist, and Hayes’s sister. The evidence concerning how Shanaya’s injury occurred was conflicting, largely because Hayes offered various explanations for the injury to the social worker and investigating officers. The trial court denied Hayes’s motion for a directed verdict, in which she challenged the State’s proof that she was the person who caused Shanaya’s injury and that she intentionally or knowingly injured the child. The court thereafter found Hayes guilty of second-degree battery, placed her on probation for four years, and ordered her to pay a \$250 fine.

I. Motion for a Directed Verdict

Although Hayes first addresses the denial of her motion to compel, we address the sufficiency of the evidence supporting her conviction before considering other trial errors to preserve her right to be free from double jeopardy. *See Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). We treat a motion for a directed verdict as a challenge to the sufficiency

of the evidence. *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.* The fact that evidence is circumstantial does not render it insubstantial. However, where circumstantial evidence is relied upon, it must exclude every other reasonable hypothesis but the guilt of the accused. *Geer v. State*, 75 Ark. App. 147, 55 S.W.3d 312 (2001). Two equally reasonable conclusions as to what occurred merely give rise to a suspicion of guilt. *Gregory v. State*, 341 Ark. 243, 15 S.W.3d 690 (2000).

Hayes was charged with second-degree battery for intentionally or knowingly causing physical injury to a person whom she knew to be younger than twelve years of age. *See* Ark. Code Ann. § 5-13-202 (a)(4)(C). Hayes moved for a directed verdict below as follows:

Your Honor, there's no evidence whatsoever as to any mental state on Ms. Hayes's behalf of intentionally or knowingly causing any injuries. Additionally, your Honor, there's no evidence that she actually caused any injury. I believe the evidence reflects that the most likely cause for these injuries is from a defensive pose. There's absolutely no evidence that Ms. Hayes ever struck, or struck her or threw a blow, anything that would cause the child to take a defensive stance. Your Honor, there's no one who has seen anything, who has seen anything, who has witnessed any wrongdoing on the part of Ms. Hayes. Your Honor, ... we submit that the evidence is insufficient for you to find that she intentionally or knowingly, without legal justification, caused any physical injury to Shanaya Hayes.

As she did below, Hayes now argues that the trial court erred in denying her motion for a

directed verdict because the State failed to prove that she caused Shanaya's injuries or that she did so knowingly or intentionally. We disagree.

The evidence adduced at trial was as follows. Hayes spent the night before Shanaya was injured in the emergency room because Hayes was sick. Hayes told Detective Jason Follett that she was exhausted and was trying to take a nap on the couch when Shanaya tried to get her attention.

The first version of events offered by Hayes was relayed to Jessica Asbury, the social worker for the hospital. Hayes told Asbury that Shanaya had been running back and forth from the kitchen to the living room, had been dancing, and tripped and fell. The second version of events, relayed by Hayes to Detective Follett, is that Hayes reached down and "snatched" her daughter to put the toddler onto the couch. However, Hayes gave Detective Marilyn Scott additional explanations for Shanaya's injury: that Shanaya fell off of the couch, that she fell while trying to pull up on the couch, and that Hayes's boyfriend twisted Shanaya's arm.

Dorothy Stephens, Hayes's sister, with whom Hayes was staying, testified that Hayes's boyfriend did not cause Shanaya's injuries. According to Stephens, Shanaya was injured when Hayes grabbed Shanaya "quick" because the child fell while attempting to climb up the couch. Stephens further testified that Hayes has a "mental problem" and gets easily confused. She also said that Hayes has a "quick temper."

Dr. Jerry Jones, a pediatrician at Children's Hospital who treated Shanaya and

examined her x-rays, testified that Shanaya had two fractures in her left arm. He said that these injuries were consistent with a child throwing up her arms in a defensive mechanism and that it would require “considerable force” to cause this type of injury because young children’s bones do not break easily.

Dr. Jones also said that Shanaya’s injury could be caused by someone snatching a child by the arm or by someone twisting or pulling the child’s arm. However, he did not believe that such an injury would result from a mere fall or would likely be caused by a child falling while attempting to pull herself up onto a couch.

Dr. Charles James, an expert radiologist, reviewed Shanaya’s x-rays. He corroborated Dr. Jones’s testimony that Shanaya suffered two fractures to her left forearm. In addition, he testified that her left forearm showed another fracture that was probably two weeks old, and that the bone scan showed the possibility of a bone bruise in her right forearm.

The foregoing evidence, when viewed in the light most favorable to the State, is sufficient to prove that Hayes intentionally or knowingly caused her daughter’s injuries. A person acts “knowingly” with respect to her conduct or the attendant circumstances when she is aware that her conduct is of that nature or that the attendant circumstances exist. Ark. Code Ann. § 5-2-202(2)(A) (Repl. 2006). A person acts knowingly with respect to the result of her conduct when she is aware that it is practically certain that her conduct will cause the result. Ark. Code Ann. § 5-2-202(2)(B).

Pursuant to Ark. Code Ann. § 5-1-102(17) (Repl. 2006), the mental state of

“intentionally” has the same meaning as “purposely,” as that term is defined in Ark. Code Ann. § 5-2-202(1). In turn, § 5-2-202(1) provides that a person acts purposely with respect to her conduct or as a result of her conduct when it is her conscious object to engage in conduct of that nature or to cause the result. Additionally, it is presumed that a person intends the natural and probable consequences of her actions. *See Tarentino v. State*, 302 Ark. 55, 786 S.W.2d 584 (1990). Because intent can rarely be proven by direct evidence, the factfinder is allowed to draw upon its common knowledge and experience to infer intent from the circumstances. *Diggs v. State*, 93 Ark. App. 332, __ S.W.3d __ (2005).

This is not a case in which there is a dearth of proof regarding who injured the child. Hayes and her sister admitted that Hayes caused the injury to Shanaya, and Dr. Jones’s testimony is sufficient to prove that the child was injured while being struck in a defensive pose. Dr. Jones’s immediate response was that Shanaya’s injuries were caused by her raising her arm in a defensive posture. He also opined that the injury was caused by “considerable force” because young children’s arms do not break easily. As such, the trial court was entitled to infer that Shanaya struck a defensive pose in response to someone intentionally or knowingly attempting to injure her, as opposed to the injury being caused by an accident.

Nonetheless, Hayes asserts that there was no direct evidence that *she* acted against Shanaya in a manner that would require her daughter to strike a defensive pose. Despite her argument, the State was not required to prove that someone witnessed Hayes force her

daughter to defend herself. Dr. Jones's testimony supports a finding that Shanaya could not have been injured as Hayes asserted. Guilt may be inferred from improbable explanations of incriminating conduct. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). Even though in one of her many alternative versions of the events, Hayes told the police that her boyfriend twisted Shanaya's arm, the trial court, as the resolver of conflicting evidence and the determiner of credibility, was not required to believe her self-serving statement (which was disputed by her sister). *See Ilo v. State*, 350 Ark. 138, 85 S.W.3d 542 (2002). Accordingly, we affirm the trial court's denial of Hayes's motion for a directed verdict.

II. Motion to Compel

We also affirm the trial court's denial of Hayes's motion to compel the State to apply the mental state of "intentional." Hayes's argument in this regard is that because the information listed two culpable mental states, "knowingly" and "intentionally," she was not provided adequate notice of the charges against her. She further asserts that because criminal statutes are construed against the State pursuant to the "rule of lenity," the State should have been held to the "higher mental state of intentionally."

The United State Supreme Court set forth the requirements for a valid charging instrument as one that: (1) includes the elements of the crime, (2) provides adequate notice of the charge, and (3) provides protection against double jeopardy. *Hamling v. United States*, 418 U.S. 87 (1974). The true test of the sufficiency of the indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the

charged offenses and sufficiently apprises the defendant of what she must be prepared to defend. *Williams v. State*, 302 Ark. 234, 788 S.W.2d 241 (1990).

Here, it cannot be said that Hayes did not have adequate notice of the charges against her where the information named her as the defendant, cited to the second-degree battery statute, and *quoted* the alternative mental states of “intentionally or knowingly” as set out in that statute. *See, e.g., Hagen v. State*, 315 Ark. 20, 864 S.W.2d 856 (1993) (affirming the adequacy of the charging instrument where it listed the defendant's name, stated that the defendant was charged with third-degree battery, tracked the language of third-degree battery statute indicating the defendant was charged with *purposely or recklessly* causing physical injury, and recited that third-degree battery was a Class A misdemeanor).

Hayes fails to cite to any direct authority requiring the State to *choose* a mental state of *either* knowingly or intentionally when charging a defendant under the second-degree battery statute. While Hayes may not have known before trial *which* mental state the State intended to prove – knowing or intentional – she knew that the State would be required to prove *one or the other*. Notably, she fails to explain how the alleged defect in the information in this case prevented her from preparing to defend against *either* mental state.

Thus, ultimately, Hayes cannot prevail on appeal because she has not proven that she was prejudiced by the wording of the charges in this case. *See* Ark. Code Ann. § 16-85-405(a) (Repl. 2005) (providing that no indictment is insufficient, nor can the trial, judgment, or other proceeding thereon be affected, by reason of any defect which does not prejudice the

substantial rights of the defendant).

Finally, the rule of lenity does not compel reversal here because that rule applies only when there is a “doubt” or ambiguity to be resolved against the State. *See Rickenbacker v. Norris*, 361 Ark. 291, 206 S.W.3d 220 (2005). Here, there is no ambiguity in the second-degree battery statute as both mental states prescribed in that statute, knowingly and intentionally, are statutorily defined.

Affirmed.

HART and BIRD, JJ., agree.

